United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

BRIEF FOR APPELLANT JOSLIN

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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

No. 23,649

UNITED STATES OF AMERICA, APPELLEE

v.

WALTER I. JOSLIN, APPELLANT

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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PROOF OF SERVICE

On January 29, 1970, copies of the brief for appellant Walter I. Joslin were mailed to the following:

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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 23,649

UNITED STATES OF AMERICA, APPELLEE

v.

WALTER I. JOSLIN, APPELLANT

BRIEF FOR THE APPELLANT

ISSUES PRESENTED

1. Whether appellant had a fair hearing on his motion to withdraw his plea of guilty, when:

(a) the trial court had pre-judged the motion adversely to appellant,

(b) appellant was not represented by counsel at the argument on the motion, and his repudiated counsel argued against him, and

(c) the motion was decided on oral argument although it raised factual issues which called for an adversary hearing.

2. Whether the denial of appellant's motion, made before sentence, to withdraw plea of guilty, was an abuse of discretion, where:

(a) there was doubt that appellant had been adequately represented by counsel, at the plea and theretofore,

(b) there was some question as to appellant's mental competence,

(c) appellant denied that he had committed the offense charged in one of the two counts, and

(d) no substantial prejudice to the Government would have resulted from the granting of the motion.

This case was previously before this Court, under the caption Walter I. Joslin v. United States, No. Misc. 3481, Criminal 180-68, when the Court granted petitioner's (appellant's) motion to proceed on appeal without prepayment of costs and for appointment of counsel. Chief Judge Bazelon and Judge Leventhal participated.

REFERENCES TO RULINGS

1. The colloquy in the court below on April 9, 1969, when appellant entered his plea of guilty, is set out as Appendix A to this brief.

2. The colloquy on May 16, 1969, on motion to withdraw guilty plea, is set out as Appendix B to this brief.

3. The proceedings on May 29, 1969, on imposition of sentence, are set out as Appendix C to this brief.

4. The "Memorandum and Order" denying leave to appeal in forma pauperis, entered by the court below on August 13, 1969, appear in the appeal record.

STATEMENT OF THE CASE

Appellant pleaded guilty to two counts of housebreaking. Immediately thereafter, and before sentence, he sought to withdraw the plea. The court below denied the motion to withdraw, and, subsequently sentenced appellant to five (5) to fifteen (15) years on each count, the sentences to run concurrently. Thereafter the court below denied leave to appeal in forma pauperis.

On November 12, 1969 this court granted appellant's motion to appeal in forma pauperis and for appointment of counsel.

The details follow.

A. PROCEEDINGS UP TO INDICTMENT

In February, 1967, the appellant, Walter I. Joslin, was in custody of the Dallas County, Texas, Sheriff's Department. He asked to talk to the F.B.I., and was interviewed by an F.B.I. agent in the Dallas County Jail. Appellant told the agent that he had committed a housebreaking in Washington, D. C., in January, 1967, and gave him certain details.

On February 25, 1967, appellant wrote the Chief of Detectives, Police Department, Washington, D. C. relating

various additional details concerning housebreakings he said he had committed in the District of Columbia. In this letter appellant stated:

> "Now then all I am asking is that you file charges and have me brought back to Washington D.C. for court action as soon as possible and in return I will clear up all the breakings I can and will not contest any court action. My main reason for this request is that I have a strong case against the State of California and I feel I would not stand a fair trial in this state or California. My case must go before a Federal Court. In the first place the Judge that sentenced me in 1955 in Los Angeles, California gave me a concurrent sentence and refused to change the sentence upon the request of the Adult Athor of California so they took it upon them-selves to do so which is not legal. Second they placed a hold on me once and then withdrew it. Now then since I was released by them in 1962 I have not broke any laws in the state of California and the U.S. Supreme Court has ruled that leaving a State while on parole does not constitute a felony and therefore is not extraditeable. They know this but they still try to get away it. So the only way I can protect my few rights is by bringing them into a Federal Court. So this is why I prefer to take my changes in your courts.
> I hope to be hearing from your office very soon.
> Thank you
>
> Yours truly
> Walter Irving Joslin."

No more comprehensible explanation has been given by appellant for inviting prosecution in the District of Columbia.

The letter of February 25, 1967 is set out in an Affidavit of Detective Owens, attached to a complaint he filed against appellant on March 21, 1967. This affidavit also notes:

> "On March 14, 1967, Walter Irving Joslin, again wrote this department a letter, in which he stated that he recalled two names of persons whos homes he had broke into, while in Washington D.C. He stated the names of these persons were, DOYLE and a man who he was not sure of the spelling, SYMINGTON. In this second letter he discrobed the fore mentioned complainants homes and the method of entry."

A warrant for appellant's arrest on a charge of housebreaking was issued in the District of Columbia on March 21, 1967. Appellant signed a "Waiver of Removal Hearing" form, and was brought back to the District of Columbia on March 24, 1967.

After appellant's return to the District, and before March 30, 1967, Paul S. Sherbacow, a staff attorney with the Legal Aid Agency for the District of Columbia, was appointed to represent appellant.

Appellant continued to cooperate with the police, and offered to accompany them and identify particular residences he said he had broken into.

On March 30, 1967, on application of appellant's counsel, Judge Sirica ordered that appellant be examined by the psychiatric staff of the Legal Psychiatric services. After examining appellant in the District Jail the next day, Dr. Donald Greenberg wrote to Judge Sirica that:

> "He [appellant] is competent to waive his right not to incriminate himself and then to assist the Metropolitan Police Department in the investigation of crimes allegedly committed by him."

On April 6, 1967, Judge Curran ordered that appellant be released from the D. C. Jail to the custody of the U. S. Marshal, for the purpose of assisting the police in the solution of crimes allegedly committed by appellant. The order directed that appellant's counsel accompany appellant at all times during the release.

Pursuant to this order, appellant, accompanied by his counsel, went with police to northwest Washington, where appellant pointed out a number of houses or offices he said he had broken into, and described his manner of entry and, in some instances, items he had taken. The police department memorandum detailing this trip [which is not included in the record] makes no mention of any Symington house.

On motion of counsel for appellant, Judge Hart, on April 21, 1967, committed appellant to St. Elizabeths Hospital for a period not to exceed 60 days for mental examination. On June 23, 1967, David W. Harris, M.D., Acting Superintendent, St. Elizabeths Hospital, wrote the Clerk, U. S. District Court, as follows:

"Mr. Walter I. Joslin was admitted to Saint Elizabeths Hospital for mental examination for a period not to exceed sixty days.

"Mr. Joslin's case has been studied since his admission to the Hospital and he has been examined by qualified psychiatrists. On June 22, 1967, he was examined and his case reviewed in detail in a medical staff conference. As a result of these examinations it is our opinion that Mr. Joslin has a Sociopathic Personality Disturbance, Sexual Deviation (Masochism), but is mentally competent for trial, by virtue of being able to understand the proceedings against him and properly to assist in his defense. He had this condition during the years of 1965 through the present date, however, the alleged criminal offenses, if committed by him, were not the result of this personality disorder. It is our opinion that the patient was competent to waive his right not to incriminate himself and then to assist the Metropolitan Police Department in the investigation of crimes allegedly committed by him. These determinations were made as a result of psychiatric examinations which indicate that there is no disturbance of affect or associations; there was no evidence of hallucinatory or delusional experiences at any time during the present hospitalization; perception, attention; orientation, memory and general intellectual functions were considered within normal limits. He is not receiving psychotropic medication."

On July 13, 1967, Judge Hart entered an order reciting that the letter of June 23, 1967, "certified that the defendant is mentally competent for trial," that there was no objection to the certification by the defendant or his counsel or the Government, and that it is:

> "FOUND, that the defendant has sufficient present ability to consult with his counsel with a reasonable degree of rational understanding and has a rational as well as a factual understanding of the proceedings against him."

The same day, July 13, 1967, Judge Hart signed a second order returning appellant to the John Howard Pavilion of St. Elizabeths for 30 days. This second order recites that "the defendant has been found to be mentally ill by the Staff of St. Elizabeths Hospital"; that upon being returned to the D. C. Jail appellant "has suffered from physical disabilities requiring his hospitalization by that institution"; and that the U. S. Attorney has no objection to appellant's return to St. Elizabeths for 30 days. On August 8, 1967, the Superintendent, Dr. Cameron, wrote the Clerk that appellant "has been adequately treated for his physical condition and is ready for transfer back" to the D. C. Jail.

However, on August 16, 1967, Judge Curran entered an order as follows:

> "Upon consideration of oral representations by counsel for the defendant and Assistant United States Attorney, Daniel McTague, to the effect that the defendant has expressed suicidal tendencies and ideas; and upon finding that the defendant has been returned to the District of Columbia Jail at the completion of a 30 day period of reconfinement to Saint Elizabeths Hospital and has continued to express these tendencies,
>
> "IT IS THIS 16th day of August, 1967, HEREBY ORDERED that the defendant, Walter I. Joslin, be returned to the John Howard Pavilion of Saint Elizabeths Hospital for a period of 30 days, during which time he shall be supervised and re-evaluated in regard to his competency to stand trial."

On November 30, 1967, Dr. Harris, Acting Superintendent, St. Elizabeths, wrote the Clerk:

> "It is our opinion that Walter I. Joslin is mentally competent for trial by virtue of having a rational as well as factual understanding of the charges against him."

On December 28, 1967, Judge Gasch entered an order, identical with the order of July 23, 1967, finding appellant to be competent. This order, like the earlier one, recites that there is no objection by appellant or his counsel.

On January 4, 1968, appellant wrote the District Court that he had been removed from the hospital the preceding day, and that the hospital had tried to reach his attorney to suggest to him that he have appellant returned to the hospital. Appellant asked that the charges against him be dismissed because of delay, and that he be allowed to have himself committed to St. Elizabeths. This letter bears the notation "Denied, Curran, J., 3/25/68."

Meanwhile, on January 4, 1968, Judge Robinson entered the following order:

> "It appearing to the court upon oral representations to the court by defendant's counsel and upon examination of the previous court records in this case that the defendant is now suffering from a mental illness and has previously attempted to take his life and it further appearing that continued confinement at Saint Elizabeths Hospital would be in the best interest of the defendant in the opinion of Dr. William Schwartz,

"It is this 4th day of January 1968,

"ORDERED, that the defendant Walter Joslin remain in custody at John Howard Pavilion at Saint Elizabeths Hospital until such time as his present case is finally disposed."

B. THE INDICTMENT.

On February 21, 1968, a twelve count indictment was filed against appellant in U. S. District Court. It contains nine counts of housebreaking and three of grand larceny. Counts Sixth and Eighth read as follows:

"SIXTH COUNT

"On or about January 14, 1967, within the District of Columbia, Walter I. Joslin entered the dwelling of Lloyd Symington and Nancy E. Symington, with intent to steal property of another.

"EIGHTH COUNT

"On or about January 14, 1967, within the District of Columbia, Walter I. Joslin entered the dwelling of Frank M. Doyle and Joanne Doyle with intent to steal property of another."

C. PROCEEDINGS BETWEEN INDICTMENT AND PLEA

On March 8, 1968, George Peter Lamb, Jr., was appointed to represent appellant in lieu of Paul Sherbacow (who was leaving the city).

On March 15, 1968, entered a plea of Not Guilty. The plea recites that "The defendant is remanded to the District of Columbia Jail."

However, appellant remained in St. Elizabeths until December 10, 1968. On November 29, 1968, Dr. Jacobs, Superintendent, St. Elizabeths, wrote Judge Robinson in part as follows:

> "Dr. Kunev has evaluated Mr. Joslin and it [sic] his medical opinion that Mr. Joslin no longer needs maximum security hospitalization and could be returned to Court for disposition of his charges."

On December 6, 1968, Judge Robinson ordered appellant transferred to D. C. Jail to await trial.

During the ensuing period appellant received letters from his counsel, Mr. George P. Lamb, Jr., which may have a bearing on the issues of whether he was effectively represented below, and on the voluntariness of his plea of guilty.

On December 27, 1968, Mr. Lamb wrote appellant in part as follows:

"You must think that I have not been working on your case. However, the opposite is far more the truth.

"As you indicate, each day of delay in your case insures dismissal for want of prosecution for lack of a speedy trial. I will be out of town for three weeks, but upon my return two motions will be filed: 1) to suppress all evidence seized from you by the U.S. Attorney and 2) a motion to dismiss for want of a speedy trial. If we get a fairly decent judge that will end the case.

* * * * *

"Keep the faith a little longer and I think you'll see the street. Bond at this time would only hurt the ultimate outcome of your case." (Italics Added).

On February 10, 1969, Mr. Lamb wrote:

"In light of all the complexity in this case and the hanky panky as far as I am concerned, the whole indictment should be dismissed. I believe this ultimately will be supported by the court.

* * * * *

"As I indicated to you prior to Christmas, it is my opinion that the government has stalled long enough in this matter. One year's delay between arrest and indictment and trial is also incredible. The motion to dismiss for want of a speedy trial is in the process of being prepared. However, there is a substantial question of timing in order to have the best chance of a favorable ruling on the motion.

"In light of the age of your case I am quite certain that Judge Curran will not allow this matter to lie around much longer. On the other hand, every day that the matter is not brought to trial further substantiates the motion to dismiss the indictment for want of a speedy trial." (Italics Added).

No motion to dismiss for want of a speedy trial, or to suppress evidence, was in fact ever filed by Mr. Lamb.

Appellant was, however, for a while under the impression that such a motion had been filed and denied. (A proposed petition for mandamus, prepared by appellant pro se, and attached to a letter from appellant to Judge Curran dated April 30, 1969, states that Mr. Lamb filed a motion to dismiss for want of a speedy trial on or about March 13, 1969, and that the motion was denied. Also, on March 31, 1969, appellant wrote the Clerk of the District Court requesting, among other things:

> "(1) A copy of the reason why Judge Curran denied the motions filed by my attorney (Mr. George Peter Lamb) for a dismissal on the grounds of the lack of a speedy trial."

[This letter does not appear in the appeal record.] The answering letter from the Clerk's Office does not refer to this request of appellant).

On March 12, 1969, (filed March 21, 1969), petitioner, pro se, submitted a "writ of habeas corpus." The petition urged, among other things, that the police had illegally seized evidence and that petitioner had been denied the right to a speedy trial. On March 17, 1967, Judge McGuire issued an order authorizing filing of the petition without prepayment of costs, and directing respondent to show cause. A return and answer was filed on April 1, 1969.

On April 15, 1969 Judge McGuire entered an order discharging the rule and dismissing the petition. This order was issued on the petition and the return and answer, without oral argument. The proposed order was mailed to petitioner April 14, 1969. [These papers are in file No. 49-69, Habeas Corpus. They are not in the appeal record.]

D. THE PLEA OF GUILTY

Appellant's case was called for trial before Judge Curran on April 8, 1969. Appellant met with his counsel, Mr. Lamb, about 30 minutes before the trial was scheduled. This was the first time appellant had seen Mr. Lamb since his arraignment more than a year before. (Transcript of Proceedings before Judge Curran, May 16, 1969, p. 2.) Mr. Lamb recommended that appellant accept the Government's proposal that he withdraw his plea of not guilty, and plead guilty to two counts of housebreaking selected by the Government.

The transcript of the ensuing proceedings before Judge Curran is set out in its entirety as Appendix A to this brief. The Court stated that appellant had offered to plead to two counts of housebreaking, and asked Mr. Cohen, the Assistant U. S. Attorney, which counts he wanted. Mr. Cohen chose counts 6 and 8, which charged appellant with entering the dwellings of Lloyd Symington (Count 6) and Frank Doyle (Count 8) with intent to steal. The Court then interrogated appellant, along the lines laid down in

the 1959 Resolution of the Judges of the U. S. District Court for the District of Columbia. (The Resolution is set forth in Everett v. United States, 119 U.S. App. D.C. 60, 33 F.2d 979 (1964)). Appellant answered in the affirmative when asked whether he was fully satisfied with the services of his attorney; and also when asked whether he was guilty of entering the Symington and Doyle dwellings with intent to steal property of another. Appellant was remanded to jail to await sentencing.

E. THE MOTION TO WITHDRAW PLEA OF GUILTY.

The following day, April 9, 1969, appellant wrote Judge Curran a letter in which he protested that he was not guilty on the Symington count (i.e., Count 6). Appellant stated that before he appeared before Judge Curran he talked to Mr. Lamb, and that because of the way Mr. Lamb "felt about not being able to win the case" he told him that he would stick to the agreement he, the appellant, had made with Mr. Smith (an Assistant U. S. Attorney) in 1967 to plead guilty to two counts. Appellant stated, however, that he had never confessed to the Symington housebreaking, and did not commit it. His letter stated:

> "I made a tour of the N.W. Section with the police* * *. However I did not admit to the Symington place nor did I at anytime admit to having broken into it. I did hint to it only because in one of the houses I had seen a credit card with name of Symington U.S. Senator on it. This is the truth. I

> was not in his house at all nor did I at anytime take any jewelry in that amount from any house. All the knowledge I obtained about that case I picked up from the F.B.I. agent in Dallas, Texas and the police here. I only plead guilty to that charge yesterday because I too am tired of this long drawn out affair."

Appellant went on to complain about the delays in his case, and pointed out that he had a petition for habeas corpus pending before Judge McGuire. Appellant concluded: "I trust you will see that justice is served in this matter of the writ."

On April 20, 1969, Mr. Lamb wrote appellant in part as follows:

> "I am astonished by the contents of your letters. However, I have discussed the matter with Judge Curran and Assistant U. S. Attorney Cohen and both are willing to permit you to withdraw your plea of guilty to the Symington housebreaking and enter a plea of guilty to any other count of housebreaking in the indictment. This must, however, be done almost immediately.
>
> "With respect to your Writ of Habeas Corpus, by now counsel should have been appointed to represent you. I feel that this is not my responsibility and I feel it should be handled as a separate matter." (Italics Added).

On April 30, 1969, appellant wrote Judge Curran in part as follows:

> "In view of all the facts of this case I am hereby at present standing by my last decision of entering a plea of not-guilty to the charges.
>
> "Furthermore I am requesting of your honor to dismiss Mr. George Peter Lamb, Jr., from my case as of this date. And allowing me to have an attorney from the Legal Aid Office.

> "Regardless of what Mr. Lamb may state to the Court or myself, I am sure of late he has not been acting in my best interest. The only time he has conferred with me on the case during the year or more he has been on the case, was just before I appeared before you on April 8, 1969."

Appellant went on to pointed out that he had a history of mental illness, and stated that he was willing to be committed to the Veterans Administration hospital at Perry Point, Maryland. Appellant enclosed copies of letters which had been sent him by Mr. Lamb, including those of December 27, 1968, and February 10, 1969, quoted from above.

On May 16, 1969, Judge Curran heard argument "on motion to withdraw guilty plea." The transcript of these proceedings is set out in its entirety as Appendix B to this brief. Appellant, Mr. Lamb, and the Assistant U. S. Attorney were present.

Appellant spoke first, and stated:

> "I feel that my attorney kind of hurried me in this thing. I had only seen him thirty minutes prior to this trial coming up in the year or so he has had this case and we had made no preparation at all. He informed me that he stood no chance of winning a plea in my favor with a jury or anything else, that I was sewed up tight, so to speak * * *." [Proceedings, May 16, 1969, p.2.]

Appellant said that he then brought up the discussion he had had with Assistant U. S. Attorney Smith (i.e., two years before) about pleading guilty to two

counts; that Mr. Lamb said that was a good idea; that appellant let Messrs. Cohen (the Assistant U. S. Attorney) and Mr. Lamb pick out the counts; and "I didn't know exactly what the two charges were until after they were read off and then it dawned on me that the Government had no evidence whatsoever."

Judge Curran pointed out that appellant had stated in court that he understood that he was pleading guilty to these crimes, and appellant declared that he was confused at the time. Appellant then adverted to the long delays that had taken place, and to his long history of mental illness.

Mr. Cohen stated:

"* * * One, this defendant at no time was ever declared incompetent by any psychiatrist or this Court. He called the FBI in Dallas, Texas, and said he wanted to inform of certain crimes he committed in the District of Columbia. He was advised of his rights and signed no less than three waivers of his rights. He wrote two letters to the Police Department admitting crimes in Washington. He was brought back here and he was given counsel. A legal aid attorney advised him of his rights and he said he wanted to go to the Police Department and point out the crimes he committed. He was examined by Legal Psychiatric Services first to determine whether he was competent to do that. They rendered an opinion he was competent. This Court entered an order finding him competent and issued an order releasing him in the custody of the Marshal to accompany the Police Department and Mr. Sherbicov of the Legal Aid Agency. They went to the Northwest area of Washington and Mr. Joslin pointed out approximately twelve homes he had burglarized and described them in detail and the items he had taken and the

> manner of entry. The attorney was with him at all times. At a later time he confessed to the Simmons [sic] burglary."

Mr. Cohen went on to relate that appellant had agreed with Mr. Smith, an Assistant U. S. Attorney, that he would plead guilty to two of the burglaries if he were found competent at St. Elizabeths, that appellant was found competent, but "He began a series of, so-called, suicidal attempts on his life which kept getting him back in St. Elizabeths. He was then indicted after a year when it became clear he was not going to follow through."

Mr. Cohen stated that on the trial date the Government had two witnesses from Dallas and one from Detroit in the courtroom, and thirty witnesses standing by under subpoena in Washington; and was ready to go to trial on every count; and that it was under those circumstances that the defendant plead guilty.

Mr. Lamb stated that after he was appointed to represent appellant he had reviewed the file of his predecessor and had had many conversations with him, and with various assistant U. S. attorneys. Mr. Lamb said that appellant had confessed, and had agreed to plead guilty on two counts, before he ever got into the case, but that appellant later refused to enter a plea. Mr. Lamb asserted:

> "I was prepared to go to trial on this case on the date it was in Court. I had sufficient knowledge and sufficient background of the facts in the case to have been ready for trial. I was ready to go to trial on that date."

Mr. Lamb concluded:

> "I feel there is a substantial barrier between us and I feel I can no longer represent him."

At the conclusion of this colloquy Judge Curran denied the motion to withdraw the plea of guilty; relieved Mr. Lamb as counsel; set the case for sentence in a week; and said that he would appoint new counsel for sentence.

Mr. Paul Chernoff, of the Legal Aid Agency, was appointed as counsel for sentence.

The transcript of the proceedings before Judge Curran, on May 29, 1969, on imposition of sentence, is set out as Appendix C to this brief. Judge Curran sentenced appellant to five (5) to fifteen (15) years on Count 6, and to five (5) to fifteen (15) years on Count 8, the sentences to run <u>consecutively</u>. The Government dismissed the remaining counts. Notice of Appeal was filed June 5, 1969.

On August 13, 1969, Judge Curran entered a "Memorandum & Order" denying leave to appeal in forma pauperis. [This memorandum is included in the appeal record.] In this Memorandum Judge Curran paraphrased the statements made by Messrs. Cohen and Lamb at the hearing on May 16. Judge Curran also adverted to the letter written him by appellant on April 9, 1969, in which

appellant revealed that he had agreed with Mr. Smith in 1967 to plead guilty to two counts. The Memorandum concludes (p. 3):

> "While the defendant pleaded guilty to entering the Symington house, he now denies it. Under the circumstances of this case, it is the conclusion of this court that the appeal is frivolous and not taken in good faith."

On September 11, 1969, counsel for appellant filed a "motion to proceed on appeal in forma pauperis and for appointment of counsel." This motion asked leave to appeal in forma pauperis from the denial by Judge Curran on May 16, 1969, of petitioner's motion to withdraw his plea of guilty prior to sentencing, and from the two consecutive fifteen year sentences imposed May 29, 1969.

This Motion was granted on November 12, 1969, by Chief Judge Bazelon and Judge Leventhal; and present counsel was appointed to represent appellant.

RULES INVOLVED

Rule 11, Federal Rules of Criminal Procedure, provides:

> "A defendant may plead not guilty, guilty, or, with the consent of the court, nolo contendere. The court may refuse to accept a plea of guilty, and shall not accept the plea without first determining that the plea is made voluntarily with understanding of the nature of the charge. If a defendant refuses to plead or if the court refuses to accept a plea of guilty or if a defendant corporation fails to appear, the court shall enter a plea of not guilty."

Rule 32(d), Federal Rules of Criminal Procedure, provides:

> "Withdrawal of Plea of Guilty. A motion to withdraw a plea of guilty or of nolo contendere may be made only before sentence is imposed or imposition of sentence is suspended; but to correct manifest injustice the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his plea."

ARGUMENT

I

APPELLANT WAS NOT GIVEN A FAIR HEARING ON HIS MOTION TO WITHDRAW HIS PLEA OF GUILTY

The facts with respect to this aspect of the case are detailed on pp. 13-18. They may be summarized as follows.

On April 19, 1969, the day after he had pleaded guilty on two counts, and, of course, before he had been sentenced, appellant wrote Judge Curran that he was not guilty on one of the counts, i.e. the Symington count.

On April 20 appellant's counsel, Mr. Lamb, wrote him that he had discussed the matter with Judge Curran and the Assistant U. S. Attorney, and that "both" were willing

to permit him to withdraw his guilty plea on the Symington count, but only if he pleaded guilty to some other count "almost immediately."

On April 30 appellant wrote Judge Curran that he was standing by his decision to plead not guilty "to the charges." He requested Judge Curran to dismiss Mr. Lamb as his counsel "from this date" and to appoint an attorney from the Legal Aid Office.

Judge Curran treated appellant's letter as a "motion to withdraw guilty plea" and heard oral argument on the motion on May 16, 1969. The transcript of the oral argument is attached hereto as Appendix "B".

The transcript lists Mr. Lamb as appearing for appellant. However the only argument in support of the motion was made by appellant himself. The Assistant U. S. Attorney argued against the motion, and so, in substance, did Mr. Lamb. The arguments made by the three are summarized supra pp 15-18.

At the conclusion of the oral arguments Judge Curran denied the motion to withdraw the plea and relieved Mr. Lamb of the appointment as counsel.

These proceedings fell abysmally short of according appellant a fair hearing, in the following respects:

1. Judge Curran had evidently pre-judged appellant's motion to withdraw his plea, and decided adversely to appellant in advance of the oral argument. Mr. Lamb's letter to appellant of April 20 states that he had discussed the matter with both Judge Curran and the Assistant U. S. Attorney, and that both were willing to permit appellant to withdraw his plea on the Symington count if he entered a plea of guilty to some other count.

2. Appellant was not represented by counsel at the argument on the motion. He argued for himself while his supposed counsel, Mr. Lamb, argued against him. Appellant had earlier requested Judge Curran to remove Mr. Lamb and appoint new counsel, but Judge Curran did not do so until the conclusion of the argument on the motion to vacate.

It has been observed:

> "... Once a plea has been accepted, defense counsel may be reluctant to advance good reasons for withdrawal, feeling that this would be an indication of his error in originally advising the plea." (Note: Pre-Sentence Withdrawal of Guilty Plea in Federal Courts, 40 N.Y.U.L. Rev. 758 (1965).)

Here appellant's counsel at the plea of guilty was not merely reluctant: he abandoned appellant, and argued against him.

3. Appellant's motion to withdraw plea raised factual issues which required an adversary proceeding with evidence taken under oath. Instead the court ruled on the motion on the basis of oral arguments or colloquies.

Under every precedent, the proceedings below fell short of assuring a fair hearing. In several cases involving motions to withdraw pleas this and other appellate courts have remanded for a new hearing, even though the proceedings below were less flagrantly unfair than here. No decision supports the procedures employed below: indeed no case has been found where procedural due process was so flagrantly transgressed as here.

In Bishop v. United States, 121 U.S. App. D.C. 243, 348 F.2d 220 (1965), this court reversed per curiam the denial of a motion to withdraw plea, on the ground that the hearing on the motion was unfair. The Court said:

> "The record amply supports amicus' observation that:
>
> > [t]he hearing granted appellant was so unfair as to be no hearing at all but merely a protagonist's implementation of a preconceived judgment. * * * While a trial judge is in an understandably difficult position in a case such as this, taking evidence upon and evaluating charges resting upon alleged incompetency and misconduct involving a member of the bar, nevertheless a fair hearing of such charges requires open inquiry and objectivity rather than, as was evident in the conduct and the remarks of the trial judge below, merely an effort to vindicate counsel."

The Court accordingly reversed and remanded for a new hearing on the motion to withdraw plea, and specified that it should be before a different judge.

The hearing in Bishop was fairer than here, in that (1) the defendant was represented at the hearing on the motion to withdraw plea by new counsel -- not, as here, by the same counsel whose alleged deficiencies in connection with the entry of the plea were in issue, and (2) the forms of an adversary hearing were observed. However, as here, the trial judge had evidently pre-judged the issue, and concluded in advance that the motion to withdraw plea was without merit.

The present case is even closer to United States v. Mainer, 383 F.2d 444 (3rd Cir., 1967). There the appellant while represented by court-appointed counsel pleaded guilty, and was sentenced to five years which were to run concurrently with a five-year sentence of which he had already served a part. After sentence appellant moved pro se to withdraw the plea of guilty, on the ground that he had been mislead by his counsel and the Assistant U. S. Attorney to believe he would receive a two-year sentence.

Just as in the present case the court held a sort of oral argument on this motion. Just as here the appellant first gave his version of what was said before he pleaded guilty; then the Assistant U. S. Attorney gave his version; and finally the appellant's former counsel gave his. As here both the Assistant U. S. Attorney and the appellant's ex-counsel disputed the appellant's version.

The procedure was however fairer than that here in that appellant's former counsel had been released from the attorney-client relationship before the hearing and the court had offered to appoint new counsel, which offer had been declined.

The Court of Appeals nevertheless reversed the order denying the motion to withdraw plea. The Court said that it was impossible to tell on the record before it whether or not the District Court had abused its discretion. It declared (p.447):

> "The court acted on colloquies between contending parties at what it considered an argument, when in fact the proceeding before it was an adversary one which required the following of at least the rudimentary procedural channels for the determination of disputed facts. Instead the proceeding resembled a discussion on sentencing* * *."

The Court stated that testimony should have been taken under oath, and it remanded for a new hearing.

As stated, no case has been found which supports the proceedings below; for no case has been found where even the most rudimentary conceptions of a fair hearing were so disregarded.

In Bruce v. United States, 126 U.S. App. D.C. 336, 379 F.2d 113 (1967) this court narrowly (2-1) sustained a denial of a motion to withdraw plea before sentence; but the trial judge had appointed new counsel and conducted a proper evidentiary hearing on the

competence of counsel at the plea of guilty. So also in Smith v. United States, 116 U.S. App. D.C. 404, 324 F.2d 436 (1963), certiorari denied, 376 U.S. 547, 84 S.Ct. 978.

Obviously the court below should have discharged counsel of his responsibility, as appellant had requested it to do.

Obviously, the court should have appointed new counsel, as appellant had requested.

Obviously the court should have conducted a fair evidentiary hearing.

However, it is not necessary to remand the case for a proper hearing on the motion to withdraw plea, for the reason that the motion should have been granted even on the basis of the hearing that was held. It was an abuse of discretion for the trial court to deny the motion, even on the record before it.

To that point we now turn.

II

DENIAL OF THE MOTION TO WITHDRAW WAS AN ABUSE OF DISCRETION

Appellant sought to withdraw his plea of guilty on one of the two counts the very next day after the plea was entered, i.e. not only before sentencing but very promptly.

While there is no absolute right to withdraw a plea of guilty, even before sentence (Everett v. United States, 119 U.S. App. D.C. 60, 336 F.2d 979 (1964), a motion to withdraw made before sentence is imposed "should be freely allowed." Poole v. United States, 102 U.S. App. D.C. 71, 75, 250 F.2d 396, 400 (1957). Withdrawal before sentencing is permitted "if for any reason the granting of the privilege seems fair and just." Kercheval v. United States, 374 U.S. 220, 224.

Here at least three separate reasons mandated that withdrawal of the plea be allowed: (1) There were substantial indications that appellant had not been adequately represented by counsel. (2) There was some question as to appellant's mental competence. (3) Appellant flatly denied that he was guilty on one of the two counts to which he had pleaded guilty. Finally (4), the government would not have been substantially prejudiced by the granting of the motion.

A. ADEQUACY OF REPRESENTATION BY COUNSEL

It is neither pleasant nor feasible for subsequent counsel to challenge the effectiveness of a predecessor;

and the representation of indigent defendants is onerous and thankless enough without counsel's being subjected to such post-audits. On those grounds it has been urged that the courts should always permit withdrawal before sentence. See Note: Pre-Sentence Withdrawal of Guilty Pleas in Federal Courts, 40 N.Y.U.L. Rev. 758, 768 (1965).

However existing practice requires scrutiny of the adequacy of the legal representation afforded appellant at his plea of guilty and theretofore. It is submitted that the trial court should have granted appellant's motion to withdraw plea, in view of the very substantial doubt that he had been adequately represented by counsel.

At the argument on the motion to withdraw guilty plea, appellant stated that he had seen Mr. Lamb for only 30 minutes prior to his entering the plea of guilty and "we had made no preparation at all." Mr. Lamb did not deny the first part of this assertion, but stated that after he was appointed to represent appellant he "reviewed the substantial jacket completed" by his predecessor as counsel; that he had numerous conversations with his predecessor as counsel and with the assistant U. S. attorneys handling the matter; and he asserted

> "I was prepared to go to trial on this case on the date it was in Court. I had sufficient knowledge and sufficient background of the facts in the case to have been ready for trial."

Present counsel has not been able to examine Mr. Lamb's file on this matter because that file has been lost.[1/]

It appears however, from Mr. Lamb's own testimony, that he had not interviewed a single witness with a view to going to trial. There is no suggestion that he had even interviewed appellant, let alone the numerous doctors who had examined the appellant at Saint Elizabeths Hospital.

Mr. Lamb's numerous conversations with assistant U. S. attorneys presumably had to do with bargaining for a plea, or with trying to induce the government to accept a plea of not guilty by reason of insanity. That can hardly have constituted adequate preparation to go to trial: indeed the inference is strong that Mr. Lamb never expected to go to trial.

It is submitted that the colloquy between appellant and Mr. Lamb on this question should have lead the court below to conclude that there was substantial doubt whether appellant had been adequately represented.

Moreover the trial court had other reasons for doubting the adequacy of that representation. Appellant, when he wrote the trial court on April 30 asking that Mr. Lamb be removed as his counsel, enclosed copies of letters which had been sent him by Mr. Lamb. These letters strongly suggested that Mr. Lamb had behaved very irresponsibly in representing appellant.

1/Mr. Lamb sent his file to the Washington Chapter of the American Civil Liberties Union, at its request. The ACLU lost the file.

Relevant portions of these letters are set out supra p. 10. On December 27, 1968 Mr. Lamb wrote appellant that he was going to prepare two motions, one to suppress evidence and one to dismiss for want of a speedy trial. He asserted "If we get a fairly decent judge that will end the case." Again on February 10, 1969, Mr. Lamb wrote appellant that a motion to dismiss for want of a speedy trial "is in the process of being prepared." He likewise said "Keep the faith a little longer and I think you'll see the street."

However Mr. Lamb never filed any motion to dismiss for want of a speedy trial, or any motion to suppress evidence.

Finally, on March 12, 1969 appellant pro se submitted a "writ of habeas corpus" raising issues of illegally seized evidence and denial of a speedy trial. Mr. Lamb did not appear for appellant in this matter, and the petition was dismissed by Judge McGuire April 15, 1969. In a letter to appellant dated April 20, 1969, which was supplied to the court below by appellant, Mr. Lamb stated "With respect to your Writ of Habeas Corpus, by now counsel should have been appointed to represent you. I feel that this is not my responsibility and I feel it should be handled as a separate matter."

It is accordingly submitted that the court below had good reason to doubt that appellant had had adequate

legal representation, and that it should have resolved that doubt by permitting withdrawal of the plea of guilty.

B. DOUBT AS TO APPELLANT'S MENTAL COMPETENCE.

As the trial court was aware, appellant had spent most of the two years before he entered his plea of guilty in custody at Saint Elizabeths Hospital. This incarceration began immediately after appellant made his various confessions to the police. It is submitted that this put the court below on notice that there was a doubt as to appellant's competence, both at the time he entered the plea and two years before when he made his confessions.

At the argument on withdrawal of the plea, appellant stated "Soon after my arrival from Texas the doctors at St. Elizabeths declared me incompetent. Now, if I was incompetent when I was brought back here I must have been incompetent when I made all these rash statements in Dallas."

The Assistant U. S. Attorney responded that "this defendant at no time was ever declared incompetent by any psychiatrist or this court." In his rebuttal argument, appellant asserted that Dr. William Schwartz at Saint Elizabeths had told him that he felt that he was incompetent.

The trial court did not inquire into these discrepancies.

The Assistant U. S. Attorney was correct that the authorities at Saint Elizabeths had from time to time

certified that the appellant was competent for trial. Appellant, however, was correct in stating that Dr. Schwartz of the Saint Elizabeths staff had dissented from this evaluation. The Saint Elizabeths' files show that on August 6, 1967 Dr. William Schwartz, Medical Officer, Psychiatry, made an entry on the clinical records which states:

> "In my opinion Mr. Joslin is fairly seriously depressed and I have serious doubts about his competence to stand trial. I think that Mr. Joslin would be much less willing to incriminate himself if he were feeling more hopeful about himself and his future."

In any event the trial court made no inquiry into this matter.

C. APPELLANT'S AVOWAL OF INNOCENCE.

The point just discussed, as to appellant's mental competence, goes to both counts of the indictment.

Moreover the appellant specifically avowed his innocence as to Count 6, the Symington Count.

In his letter of April 9, 1969 to Judge Curran he stated that he had never confessed to the Symington housebreaking; that he did not in fact commit it; that on his tour with the police he did not point out the Symington house as one he had broken into; that he did tell the police that in one house he had seen a credit card with the name of Senator Symington on it, but that he was not in Senator Symington's house.

At the argument on the motion to withdraw plea, the only assertion of the Assistant U. S. Attorney with regard to, presumably, the Symington Count was that "At a later time [i.e., subsequent to the police escorted tour] he confessed to the Simmons [sic] burglary."

The court below evidently concluded that appellant's avowal of innocence was not made in good faith. However that was not an issue to be determined on the motion to withdraw plea. This court held in Gearhardt v. United States, 106 U.S. App. D.C. 270, 273, 272 F.2d 499, 502 (1959):

> "Where the accused seeks to withdraw his plea of guilty before sentencing, on the ground that he has a defense to the charge, the District Court should not attempt to decide the merits of the proffered defense, thus determining the guilt or innocence of the defendant."

It may be noted that in Everett, which is the leading case in this jurisdiction on the proposition that there is no absolute right to withdraw a plea even before sentence, the trial court did allow withdrawal on the count as to which the defendant professed innocence. The issue in this court involved only the count on which the defendant continued to admit guilt.

D. PREJUDICE TO THE GOVERNMENT.

The Government argued below that withdrawal of the plea would be prejudiced to it because on the

day set for trial it had two witnesses from Dallas present, and one from Detroit, and thirty witnesses standing by under subpoena in Washington.

In one case leave to withdraw plea was denied, on the ground of prejudice to the government, where the government had brought in 52 witnesses for the trial from all over the United States and various overseas naval bases. Farnsworth v. Sanford, 115 F.2d 375 (5th Circuit, 1940). No comparable showing of prejudice to the government has been made here, while, conversely, the defendant in Farnsworth did not advance the substantial grounds for permitting withdrawal of the plea that are present here.

CONCLUSION

For the reasons stated, the order of the court below denying appellant's motion to withdraw his pleas of guilty should be reversed, and the case remanded with directions that the motion be granted.

Respectfully submitted,

THOMAS E. HARRIS, ESQ.
815 16th Street, N. W.
Washington, D. C. 20006

Counsel for Appellant
(Appointed by the Court)

APPENDIX "A"

COLLOQUY ON APRIL 9, 1969,
WHEN GUILTY PLEA ENTERED

The above entitled matter came on for plea before the HONORABLE EDWARD M. CURRAN, United States District Chief Judge.

WILLIAM COHEN
For the Government

GEORGE PETER LAMB
For the Defendant

P R O C E E D I N G S

(The defendant and his counsel were present.)

THE DEPUTY CLERK: United States versus Walter I. Joslin, Criminal case 180-68. William Cohen for the Government. George Peter Lamb for the defense.

MR. LAMB: Ready for the defendant.

MR. COHEN: The Government is ready.

THE COURT: Come to the bench.

(At the bench.)

THE COURT: I am not trying this case. I have another case this afternoon. I thought you were going to plead.

MR. COHEN: This is the first I knew about it.

THE COURT: He offered to plead to two counts of housebreaking.

MR. COHEN: Reluctantly we will accept it in the interest of justice. There has been a long history in this case.

THE COURT: Which counts do you want?

MR. COHEN: Six and eight.

THE COURT: Six and eight.

MR. COHEN: Which are Lloyd Symington and Frank Doyle residence.

THE COURT: All right.

(In open Court.)

MR. COHEN: May it please the Court. Your Honor, the defendant, Mr. Joslin is indicted in a twelve count indictment, covering nine counts of housebreaking and three counts of grand larceny.

It is my understanding that the defendant wishes to now withdraw his plea of not guilty and enter pleas of guilty to Count six which charges a house breaking on or about January 14 at the dwelling of Lloyd Symington and Nancy Symington, and Count 8, a housebreaking on the same date, Frank Doyle and Joanne Doyle.

The Government is ready for trial. We have witnesses here from Dallas and Detroit. We have 27 witnesses on call in the city ready to testify in all these cases.

MR. LAMB: Your Honor, that is correct. The defendant at this time wishes to withdraw his plea of not guilty heretofore entered to count six and count eight of the indictment, waive his right to a trial by jury and enter a plea of guilty to Count six and Count eight of the indictment.

THE COURT: Have you been advised and do you understand you have a right to a speedy trial with the aid of a lawyer?

THE DEFENDANT: Yes, I do, your Honor.

THE COURT: Do you understand you will have no jury trial if your plea of guilty is accepted?

THE DEFENDANT: Yes, sir.

THE COURT: Do you understand you will have the assistance of counsel at the time of sentence if your plea is accepted?

THE DEFENDANT: Yes, sir.

THE COURT: Do you understand you are pleading guilty to two counts of housebreaking, count six and count eight, and did you commit those crimes?

THE DEFENDANT: Yes, sir.

THE COURT: Have your pleas of guilty been induced by any promises by anyone as to what sentence will be imposed by the Court?

THE DEFENDANT: No, sir.

THE COURT: Have you been threatened or coerced by anyone into entering these pleas of guilty?

THE DEFENDANT: No, sir.

THE COURT: Have any promises of any kind been made to you by anyone to induce these pleas of guilty?

THE DEFENDANT: No, sir.

THE COURT: Do you understand the consequences of entering these pleas of guilty?

THE DEFENDANT: Yes, sir.

THE COURT: Are you entering these pleas of guilty voluntarily and of our own free will because you are guilty and for no other reason?

THE DEFENDANT: Yes, sir.

THE COURT: Have you discussed your pleas fully with your attorney?

THE DEFENDANT: Yes, sir.

THE COURT: Are you completely satisfied with the services of your attorney?

THE DEFENDANT: Yes, sir.

THE COURT: Walter I. Joslin, in Criminal Case 180-68, do you desire to withdraw your plea of not guilty heretofore entered and enter a plea of guilty to the sixth count of this indictment which charges that on or about

January 14, 1967, within the District of Columbia, Walter I. Joslin entered the dwelling of Lloyd Symington and Nancy E. Symington, with intent to steal property of another? Are you guilty of that?

THE DEFENDANT: Yes, sir.

THE COURT: Walter I. Joslin, in Criminal Case 180-68, in which you are charged with housebreaking and larceny, do you desire at this time to withdraw your plea of not guilty heretofore entered and enter a plea of guilty to the eighth count of the indictment which charges on or about January 14, 1967, within the District of Columbia, Walter I. Joslin entered the dwelling of Frank M. Doyle and Joanne Doyle, with intent to steal property of another? Are you guilty of that?

THE DEFENDANT: Yes, sir.

THE COURT: I will refer him then to the probation officer.

MR. COHEN: Thank you, your Honor.

MR. LAMB: Thank you, your Honor.

THE COURT: All right.

APPENDIX "B"

COLLOQUY ON MAY 16, 1969
ON MOTION TO WITHDRAW GUILTY PLEA

Before THE HONORABLE CHIEF JUDGE EDWARD M. CURRAN

on motion to withdraw guilty plea.

APPEARANCES

On behalf of the United States:

WILLIAM M. COHEN, ESQ.
Assistant U. S. Attorney.

On behalf of the defendant:

GEORGE PETER LAMB, ESQ.

[P R O C E E D I N G S]

THE DEPUTY CLERK: Walter Joslin.

THE COURT: You entered a plea of guilty to two counts?

DEFENDANT JOSLIN: Yes, Your Honor.

THE COURT: Now you want to withdraw it?

DEFENDANT JOSLIN: Yes, sir.

THE COURT: Why?

DEFENDANT JOSLIN: I feel that my attorney kind of hurried me in this thing. I had only seen him thirty minutes prior to this trial coming up in the year or so he has had this case and we had made no preparation at all. He informed me that he stood no chance of winning a plea in my favor with a jury or anything else, that I was sewed up

tight, so to speak; and I kind of disagreed with that. But, anyway, I was confused and I said, well, what about the suggestion that I had made earlier to Prosecutor Smith about pleading guilty to two if all the other charges are dropped and he said that sounds like a good idea. He said, let's go ahead with that if that is all right. I said, well -- I was confused about it so he said let's go ahead. So I came up here and plead guilty to two charges that Mr. Cohen and Mr. Lamb picked out themself up here. I didn't know exactly what the two charges were until after they were read off and then it dawned on me that the Government had no evidence whatsoever.

THE COURT: You said you committed them.

DEFENDANT JOSLIN: What did you say?

THE COURT: You said you committed both of those crimes.

DEFENDANT JOSLIN: No, sir.

THE COURT: You didn't.

DEFENDANT JOSLIN: I plead guilty to them.

THE COURT: Weren't you asked the question, "Do you understand that you are pleading guilty to such and such and did you commit those crimes?"

DEFENDANT JOSLIN: Yes, sir.

THE COURT: And you answered, yes?

DEFENDANT JOSLIN: Yes, I did, Your Honor. But I was confused at the time.

THE COURT: What were you confused about?

DEFENDANT JOSLIN: This case has been hanging fire for two years, Your Honor, and I have been confused. I have been in custody since February of 1967. Fifteen months of that time, from January 4th of 1968, to be exact, up until April 8th I was in custody ready for trial and never brought to trial. Also, most of the evidence was evidence that I gave verbally to the Police Department. Soon after my arrival from Texas the doctors at St. Elizabeths declared me incompetent. Now, if I was incompetent when I was brought back here I must have been incompetent when I made all these rash statements in Dallas.

MR. COHEN: I would like to be heard. No. One, this defendant at no time was ever declared incompetent by any psychiatrist or this Court. He called the FBI in Dallas, Texas, and said he wanted to inform of certain crimes he committed in the District of Columbia. He was advised of his rights and signed no less than three waivers of his rights. He wrote two letters to the Police Department admitting crimes in Washington. He was brought back here and he was given counsel. A legal aid attorney advised him of his rights and he said he wanted to go to the Police Department and point out the crimes he committed.

He was examined by Legal Psychiatric Services first to determine whether he was competent to do that. They rendered an opinion he was competent. This Court entered an order finding him competent and issued an order releasing him in the custody of the Marshal to accompany the Police Department and Mr. Sherbicov of the Legal Aid Agency. They went to the Northwest area of Washington and Mr. Joslin pointed out approximately twelve homes he had burglarized and described them in detail and the items he had taken and the manner of entry. The attorney was with him at all times. At a later time he confessed to the Simmons burglary. There was an agreement and understanding that the defendant would again be committed to St. Elizabeths for mental examination. If he was found competent and Mr. Smith agreed to accept a plea of guilty to two of the barglaries no indictment would be drawn from the hospital. He was not indicted until he returned from the hospital and found competent. He began a series of, so-called, suicidal attempts on his life which kept getting him back to St. Elizabeths. He was then indicted after a year when it became clear he was not going to follow through. And then Mr. Lamb came into the case and the defendant was again committed to St. Elizabeths for re-evaluation. When that turned out unfavorable the case came to me. I immediately prepared the case, put it

on the calendar, and within one month, on the day of the plea, the Government was ready to go to trial. We had thirty witnesses under subpoena. We had two witnesses from Dallas, Texas, and a witness from Detroit in the courtroom. We were completely ready. Every complaining witness in the approximately nine burglaries was ready in this City on call and ready to come down and testify. We were completely ready to go to trial on every single count. And it was under those circumstances that this defendant came in and plead guilty.

DEFENDANT JOSLIN: Your Honor, I would like to read in part here very briefly. This is a letter from Mr. George P. Lamb. "Paul -- this is Paul Sherbicov -- took it upon himself to discuss your case with the Assistant U. S. Attorney in charge of the case here in Washington, Mr. William Cohen. Paul indicated to Mr. Cohen that it was his opinion that there were sufficient doctors at the hospital who would testify of your state of insanity to support an uncontested insanity case." I also would like to state that Dr. William Schwartz at St. Elizabeths Hospital told me himself after several interviews approximately two months after my first arrival at St. Elizabeths that he felt that I was incompetent. He told my attorney, Mr. Paul Sherbicov, the same thing. I remained over there for approximately nine months, at which time I was brought back

here to Court and answered the indictment because Dr. William Schwartz stated at the time that, I am hoping that I can find you competent pretty quickly so I can get this thing cleared up and get you in this hospital for treatment.

MR. LAMB: Your Honor, as indicated by Mr. Cohen, Mr. Sherbicov was in this case appointed by this Court. And after having the defendant examined with respect to his competency and it having been determined that he was competent, after that had been accomplished he then, in the company of Mr. Sherbicov, went with several members of the Metropolitan Police around the city and pointed out various places where the housebreakings took place. Before leaving and joining the U. S. Attorney's Office in Connecticut, Mr. Sherbicov had Judge Robinson sign a Court Order which committed the defendant to St. Elizabeths Hospital pending the outcome of this case. Some time after that I was appointed by the Court to represent Mr. Joslin. I had many, many conversations and reviewed the substantial jacket completed by Mr. Sherbicov over the course of his representation of the defendant. I had a number of conversations with Assistant U. S. Attorney Donald Smith with this matter pending before the Grand Jury. Assistant U. S. Attorney Strazzella had responsibility and I had numerous conversations with him. Then Mr. Cohen got the case and then I

believe we had four or five conversations with respect to the case. At the time the matter was still pending before the Grand Jury Mr. Sherbicov told me Mr. Joslin had agreed to enter a plea to two counts of housebreaking or plead to two informations, whichever. Mr. Joslin at that point, and I believe that was early in 1968, refused to enter a plea. Consequently, Mr. Smith proceeded with the preparation of an indictment. Mr. Cohen supplied me with numerous documents, some of which I had seen, I believe, with respect to conversations with Mr. Strazzella and conversations with Mr. Sherbicov. I was prepared to go to trial on this case on the date it was in Court. I had sufficient knowledge and sufficient background of the facts in the case to have been ready for trial. I was ready to go to trial on that date. As I indicated to Mr. Joslin on the date that he entered his plea of guilty, the Government was still willing -- somewhat reluctantly -- to allow him to enter a plea to two counts of housebreaking. I asked which two counts they wanted and indicated those to Mr. Joslin and he thereafter entered a plea. Mr. Joslin has signed numerous confessions and the letters are available. He has been advised of his rights by counsel, the Federal Bureau of Investigation and the Metropolitan Police Department. He has been formally advised by me. I feel there is a substantial barrier between us and I feel I can no longer represent him.

THE COURT: The motion to withdraw your plea is denied. You may be relieved. Set it down for a week from today for sentence.

MR. LAMB: Will subsequent counsel be appointed for sentence?

THE COURT: Yes, I will appoint new counsel.

APPENDIX "C"

PROCEEDINGS ON MAY 29, 1969
ON IMPOSITION OF SENTENCE

Before the HONORABLE CHIEF JUDGE EDWARD M. CURRAN for imposition of sentence.

APPEARANCES

On behalf of the United States:

THOMAS C. GREEN, ESQ.
Assistant United States Attorney.
WILLIAM M. COHEN, ESQ.
Assistant United States Attorney.

On behalf of the defendant:

PAUL CHERNOFF, ESQ.

[P R O C E E D I N G S]

MR. CHERNOFF: This case is before you for sentencing on two counts of burglary.

THE COURT: Do you want this sentence postponed until the Court of Appeals has acted on your writ of habeas corpus?

MR. CHERNOFF: Your Honor, Mr. Joslin would withdraw his request to have sentencing continued at this time.

THE COURT: All right.

MR. CHERNOFF: I would like to point out to the Court certain mitigating circumstances in the instant case. The defendant pleaded guilty to two counts of

housebreaking. He has, voluntarily, closed a number of cases in this District on his own. It is my understanding he has cooperated fully with the authorities. There has been a question in the past as to whether or not Mr. Joslin is mentally ill. He was discharged from the Army in 1943 for psychoneurotic behavior and St. Elizabeths Hospital found him ill for about a year. I understand there is no problem now as far as competency is concerned. He is a veteran and his long-range plans are to go to the Perry Point Hospital in Maryland and enroll himself. He realizes he has problems and that his anti-social behavior in the past is related to some of his problems. The defendant asks for leniency. The crimes are against property and no weapon was involved.

THE COURT: What have you done, spent most of your time in the penitentiary?

DEFENDANT JOSLIN: Unfortunately, yes, I have, twelve years since I came out of the service.

THE COURT: In California did you get a life sentence?

DEFENDANT: That is an indeterminate sentence, one to life.

THE COURT: How much time did you serve?

DEFENDANT JOSLIN: Ten years.

THE COURT: You will never learn, will you?

DEFENDANT JOSLIN: Yes, I will, sir.

THE COURT: In 1960, six months to fifteen years in San Francisco.

DEFENDANT JOSLIN: Your Honor, I feel that in talking to the doctors at St. Elizabeths some of these problems were ironed out and I have come to realize that most of my problems have been basically due to my neurotic condition when I was released from the service. I am beginning to have a better insight. I feel that I definitely need further treatment and the doctors have agreed with me on this. In the past I have ran away from this and have not tried to help myself in the psychiatric field. The doctors at St. Elizabeths have convinced me and I am all for it, one-hundred percent.

THE COURT: You got two life sentences in California.

DEFENDANT JOSLIN: Five to life has already expired, sir, because the one to life was a CF sentence.

THE COURT: Then you got a maximum of fifteen years after you got out of the life sentence.

DEFENDANT JOSLIN: That was incurred soon after the -- That was running concurrent with one to life.

THE COURT: You may serve five (5) to fifteen (15) years on each count, said sentences to run consecutively.

MR. COHEN: Your Honor, the Government will move to dismiss the remaining counts.

THE COURT: Very well.